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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 315

### RIN 3206-AM76

#### Noncompetitive Appointment of Certain Military Spouses

**AGENCY:** Office of Personnel Management.

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** The Office of Personnel Management (OPM) is proposing regulations which will modify the provisions governing the recruitment and employment of certain military spouses in Federal agencies to conform to statutory mandates affecting the rules governing this authority and to carry out certain provisions of Executive Order 13832 of May 9, 2018, *Enhancing Noncompetitive Civil Service Appointments of Military Spouses*.

OPM is proposing to revise the current text to: conform the eligibility criteria for appointment of military spouses to intervening statutory requirements and add agency reporting requirements.

**DATES:** Comments must be received on or before [INSERT 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by the docket number or Regulation Identifier Number (RIN) for this proposed rulemaking, by any of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for sending comments.

All submissions must include the agency name and docket number or RIN for this rulemaking. Please arrange and identify your comments on the regulatory text by subpart and section number; if your comments relate to the supplementary information, please refer to the heading and page number. All comments received will be posted without change, including any personal information provided. Please ensure your comments are submitted within the specified open comment period. Comments received after the close of the comment period will be marked “late,” and OPM is not required to consider them in formulating a final decision. Before acting on this proposal, OPM will consider all comments we receive on or before the closing date for comments. Changes to this proposal may be made in light of the comments we receive.

**FOR FURTHER INFORMATION CONTACT:** Michelle Glynn, telephone: 202-606-1571, fax: 202-606-3340, TDD: 202-418-3134, or email: [michelle.glynn@opm.gov](mailto:michelle.glynn@opm.gov).

**SUPPLEMENTARY INFORMATION:** OPM is making these changes to give effect to provisions contained in the Fiscal Year (FY) 2013 National Defense Authorization Act (NDAA), Public Law 112-239, section 566, subsequently codified at 5 U.S.C. 3330d; the FY 2017 NDAA, Public Law 114-328, section 1131, which amended 5 U.S.C. 3330d(c); and the FY 2019 NDAA, Public Law 115-232, section 573, which temporarily amends 5 U.S.C. 3330d and imposes a temporary reporting requirement on OPM; as well as certain provisions of E.O. 13832 imposing permanent agency reporting requirements.

*2008, E.O. 13473 - The original authority and OPM’s implementing regulations*

On September 25, 2008, the President issued Executive Order (E.O.) 13473 allowing agencies to make noncompetitive appointments of certain military spouses of

members of the Armed Forces. OPM implemented this E.O. via final regulations which were published in the Federal Register (FR) on August 12, 2009, at 74 FR 40471, and amended on August 31, 2011, at 76 FR 54071. OPM's rules implemented the noncompetitive hiring authority for certain military spouses created by the Executive Order. Under this hiring authority, eligible spouses included, subject to other criteria specified in the final rule, the following categories of military spouses: those who were relocating with their service member spouse as a result of permanent change of station (PCS) orders, spouses of service members who incurred a 100 percent disability because of the service member's active duty service, and the un-remarried widows or widowers of service members killed while on active duty. For a spouse using this authority pursuant to a member's PCS orders, OPM's implementing rules restricted the number of permanent appointments an eligible spouse could receive to one per each set of PCS orders. (OPM did not restrict the number of permanent appointments the spouse of a disabled or deceased member of the Armed Forces could receive under its original regulations.) OPM's original implementing rules also established a two-year limitation on the period of time during which the authority could be used.

*2011, 76 Federal Register 54071* - In 2011, OPM amended these rules to eliminate the 2-year eligibility limitation for spouses of service members who incurred a 100 percent disability or who were killed while on active duty. 76 FR 54071 (Aug. 31, 2011). This change was based upon findings provided by the Department of the Navy demonstrating that spouses experienced difficulty using the authority, in these circumstances, within the 2 years provided. 76 FR 13100, 13100 (March 10, 2011).

*The FY 2013 NDAA*

On January 2, 2013, the President signed the FY 2013 NDAA. Section 566(a) of this Act codified in statute, at 5 U.S.C. 3330d, the hiring authority previously created by E.O. 13743 and added a provision limiting the spouse of a disabled or deceased member of the Armed Forces to one permanent appointment pursuant to this authority. OPM is proposing to amend the current text of its regulations to reflect this change and expressly limit to one the number of permanent appointments an eligible spouse of a disabled or deceased member of the Armed Forces may receive under these provisions. We are proposing these changes to conform our regulations to this statutory provision. When posting a job opportunity announcement (JOA) on USAJOBS agencies can specify this requirement in the JOA and/or use the assessment questionnaire to ask whether military spouse applicants have previously received a permanent appointment under this hiring authority.

The FY 2013 NDAA also addressed the question of geographic location. OPM's current regulation at §315.612(c)(3) states that, for spouses of relocating members, use of the military spouse authority "is limited to the geographic area, as specified on the service member's permanent change of station orders," and that this area "includes the service member's duty station and the surrounding area from which people reasonably can be expected to travel daily to and from work," but also provides that "[t]he head of an agency, or his or her designee, may waive this limitation . . . if no Federal agency exists in the spouse's geographic area." The FY 2013 NDAA, however, addressed geographic area in a manner that superseded an aspect of OPM's regulations. The statute provided that the appointment of a relocating spouse "may only be to a position the duty station for which is within the geographic area of the permanent duty station of the member of the

*Armed Forces, unless there is no agency with a position with a duty station within the geographic area of the permanent duty station of the member of the Armed Forces.”*

(Emphasis supplied). That statute, therefore, eliminated the need for the relocating spouse to obtain a waiver in order for the spouse to apply, or an agency to consider the spouse, for a position outside the geographic area when no agency exists in the spouse’s geographic area. OPM proposes to amend the text of its current regulation to align with this provision, in a new paragraph (c)(5). In light of subsequent developments, discussed below, however, neither the changes imposed by the FY 2013 NDAA nor the conforming amendments to OPM’s regulation will take effect until 12:01 A.M. Eastern Time on August 13, 2023.<sup>1</sup>

#### *The FY 2017 NDAA*

Currently, the text of OPM’s regulations, as amended through 2011, purports to limit the eligibility of relocating spouses of members of the Armed Forces to 2 years from the date of the Armed Forces member’s PCS orders. On December 23, 2016, however, the President signed the FY 2017 NDAA. Section 1131 of that Act amended section 3330d(c) of title 5, United States Code to specify that, thereafter, there would be no time limitation on eligibility for relocating spouses of the Armed Forces. Under the amended statute, a spouse of a member of the Armed Forces relocating pursuant to the member’s PCS orders would remain eligible for noncompetitive appointment under this section for the duration of the spouse’s relocation to the permanent duty station of the service member. OPM proposes to amend its regulations to align with this provision,

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<sup>1</sup> The FY 2019 NDAA temporarily makes spouses of active duty members generally eligible without having to establish a relocation pursuant to PCS orders. Accordingly, at present, there is no need to reference conditions of eligibility under that prong of the original authority. That provision will expire on August 12, 2023.

although this statutory provision and the conforming OPM amendments also will have no effect until August 13, 2023.<sup>2</sup>

*2018, E.O. 13832*

On May 9, 2018, the President issued E.O. 13832, which was intended to enhance noncompetitive civil service appointments of military spouses. The E.O. states the policy of the United States is to enhance employment support for military spouses. Agencies are directed, to the greatest extent possible consistent with hiring needs, to indicate in their Job Opportunity announcement (JOA) for positions in the competitive service that they will consider candidates under the noncompetitive military spouse authority in addition to any other hiring authority the JOA indicates the agency will consider. Section 3(b) of the EO directs agencies to actively advertise and promote the military spouse hiring authority and solicit applications from military spouses for positions advertised via USAJOBS and any other means the agency wishes to use.

Section 3(f) of the Executive Order imposes an annual reporting requirement upon agencies, beginning in December 2019, so that OPM can fulfill its obligation in section 4 to provide an annual report to the President regarding the implementation of his order. The Executive Order requires agencies to report to OPM and the Department of Labor on the following information:

- the number of positions made available under the military spouse hiring authority,
- the number of applications submitted under the military spouse hiring authority,
- the number of military spouses appointed under the military spouse hiring authority during the preceding fiscal year, and

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<sup>2</sup> See note 1, above.

- actions taken to advertise the military spouse hiring authority, and any other actions taken to promote the hiring of military spouses.

OPM is proposing to amend its regulations to add this requirement to the permanent text. OPM proposes to amend its permanent regulations to add a new paragraph (h) to align with this provision.

Agencies will have to decide how they will keep track of the information collected from the effective date of E.O. 13832, to the effective date of this proposal as this E.O. required agencies to begin reporting by December 2019. The timeframes regarding OPM's issuance of final regulations for this hiring authority does not impact the reporting date required by the E.O.

As stated in E.O. 13832 dated May 9, 2018, agencies are required to begin reporting to OPM and the Department of Labor in Fiscal Year 2019, by December 31 of each year. On March 1, 2019, and September 27, 2019, OPM issued Memorandums for Human Resources Directors advising agencies that they must submit reports no later than December 31, 2019. As a reminder, these OPM policy guidance memorandums, which include information on agency reporting requirements, are located on the OPM website, on the Chief Human Capital Officer's webpage at: <https://www.chcoc.gov/content/recent-changes-noncompetitive-hiring-authority-military-spouses> and <https://www.chcoc.gov/content/agency-non-competitive-hiring-authority-military-spouses-annual-reporting>. As contained in proposed section 315.612(h)(1), E.O. 13832 further requires agencies to report separately to the Department of Labor. OPM will remind agencies of this requirement in its supplemental policy Q&A guidance.

The FY 2019 NDAA, discussed immediately below, contained a temporary reporting requirement, apparently limited to the spouses of current members of the Armed Forces on active duty, regardless of whether or not they relocate with the member. See Pub. L. 115-232 section 573(d) (Aug. 13, 2018). That temporary reporting requirement overlaps the requirement in the EO to a degree but is also somewhat different. In other words, the data being reported is a subset of the data being reported in accordance with the E.O. We discuss our resolution of these separate requirements below.

#### *FY 2019 NDAA*

On August 13, 2018, the President signed the FY 2019 NDAA. Section 573 of the NDAA, which sunsets in five years from the date of enactment (*i.e.*, the end of the day on August 12, 2023), temporarily amends several provisions of 5 U.S.C. 3330d, governing the military spouse noncompetitive hiring authority, including the need for spouses of members currently on active duty to meet existing eligibility criteria relating to relocation pursuant to PCS orders. Section 573(a) eliminates the eligibility criterion that was based on the contingency that the spouse was relocating with a military member on PCS orders and replaced it with one that includes all spouses of members of the armed forces on active duty. Section 573(a) also eliminates 5.U.S.C. 3330d(c), *Special rules regarding relocating spouses*. In accordance with revised 5 U.S.C. 3330d(b), the head of an agency may now appoint noncompetitively: the spouse of a member of the armed forces on active duty, or a spouse of a 100 percent disabled or deceased member of the armed forces. The NDAA makes any spouse of a military member on active duty eligible



for noncompetitive appointment under this hiring authority and eliminates geographic restrictions that would otherwise apply under the statute.

On March 1, 2019, OPM issued a Memorandum for Chief Human Capital Officers advising of two provisions (FY 2019 NDAA and EO 13832) that would significantly impact this hiring authority; and imposes temporary reporting requirements. As another reminder, OPM encourages readers to view OPM's more detailed policy guidance at: <https://www.chcoc.gov/content/recent-changes-noncompetitive-hiring-authority-military-spouses>.

Because of the sunset provision, OPM's proposed rule provides both for temporary exceptions to the permanent rules necessitated by the FY 2019 NDAA and for eventual changes to the permanent regulations, which will be revived on August 13, 2023 but which do not yet conform to changes effected by the FY 2013 and 2017 NDAAs. These changes appear at §§ 315.612(a) *Agency Authority*, 315.612(b) *Definitions*, 315.612(c) *Eligibility*, 315.612(d) *Conditions*, and 315.612(e) *Proof of Eligibility*. Renumbering of these sections is proposed where appropriate. The definition of *Permanent change of station* was intentionally removed as it no longer applies for the next five years (i.e., until August 13, 2023).

As noted above, the FY 2019 NDAA also contained a temporary reporting requirement specific to the spouses of active duty service members that will sunset on August 13, 2023. Section 573(d) requires agencies to report to OPM on an annual basis (i.e., by December 31 of each year) on:

- the number of relocating and non-relocating spouses of current military members appointed under this authority;

- the types of positions filled; and
- the effectiveness of this hiring authority.

OPM is proposing to add temporary text to section 315.612(h)(2) to cover agency reporting requirements that differ from the President's requirement. The proposed rule at subsection 315.612(h)(2)(ii) requires agencies to collect information on both types of spouses and to record these distinctions as appointments are made for inclusion in their reports to OPM.

Proposed section 315.612(h)(2)(ii) requires agencies to report on the types of positions filled under this authority. OPM is proposing that agencies provide data specific to the title, series, and grade level of positions filled under this authority.

Agencies must comply with the reporting requirements in both proposed 5 CFR 315.612(h)(1) and (2) until August 13, 2023. On August 13, 2023, and thereafter agencies will comply with only proposed 5 CFR 315.612(h)(1). OPM is proposing to make these necessary changes to conform our regulations to permanent changes to 5 U.S.C. 3330d required by the 2013 and 2017 NDAA's and a new reporting requirement imposed by EO 13832, as well to reflect the temporary requirements added by the 2019 NDAA. Following sunset of the temporary requirements, OPM's regulations will be deemed to revert to the permanent regulations, i.e., the current regulations, as revised pursuant to the FY 2013 NDAA and the FY 2017 NDAA.

How agencies should report in 2023, will depend on whether Congress chooses to continue these provisions after the August 13, 2023, date. In the absence of Congress passing any new statutes on this issue, agencies should comply with only proposed 5 CFR 315.612(h)(1) pertaining to E.O. 13832.

**Regulatory Flexibility Act**

I certify that this regulation will not have a significant impact on a substantial number of small entities because it applies only to Federal agencies and employees.

**E.O. 13563 and E.O. 12866, Regulatory Review**

This rule has been reviewed by the Office of Management and Budget in accordance with E.O. 13563 and 12866.

**Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs**

This rule is not an E.O. 13771 regulatory action because this rule is not significant under E.O. 12866.

**E.O. 13132, Federalism**

This regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

**E.O. 12988, Civil Justice Reform**

This regulation meets the applicable standard set forth in section 3(a) and (b)(2) of Executive Order 12988.

**Unfunded Mandates Reform Act of 1995**

This rule will not result in the expenditure by State, local or tribal governments of more than \$100 million annually. Thus, no written assessment of unfunded mandates is required.

**Congressional Review Act**

This action pertains to agency management, personnel and organization and does not substantially affect the rights or obligations of nonagency parties and, accordingly, is not a “rule” as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

**Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)**

This final regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

**List of Subjects in 5 CFR Part 315**

Government employees.

Office of Personnel Management

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Alexys Stanley,  
Regulatory Affairs Analyst.

Accordingly, OPM is proposing to amend 5 CFR part 315 as follows:

**PART 315 – CAREER AND CAREER-CONDITIONAL EMPLOYMENT**

1. The authority citation for part 315 is revised to read as follows:

**Authority:** 5 U.S.C. 1302, 3301, and 3302; E.O. 10577, 3 CFR, 1954-1958 Comp. p.218, unless otherwise noted; and E.O. 13162.

Secs. 315.601 and 315.609 also issued under 22 U.S.C. 3651 and 3652.

Secs. 315.602 and 315.604 also issued under 5 U.S.C. 1104.

Sec. 315.603 also issued under 5 U.S.C. 8151.

Sec. 315.605 also issued under E.O. 12034, 3 CFR, 1978 Comp. p.111.

Sec. 315.606 also issued under E.O. 11219, 3 CFR, 1964-1965 Comp. p. 303.

Sec. 315.607 also issued under 22 U.S.C. 2560.

Sec. 315.608 also issued under E.O. 12721, 3 CFR, 1990 Comp. p. 293.

Sec. 315.610 also issued under 5 U.S.C. 3304(c).

Sec. 315.611 also issued under 5 U.S.C. 3304(f).

Sec. 315.612 also issued under E.O. 13473, Pub. L. 112-239, Sec. 566; Pub. L. 114-328, Sec. 1131; Pub. L. 115-232, Sec. 573; and E.O. 13832.

Sec. 315.708 also issued under E.O. 13318, 3 CFR, 2004 Comp. p. 265.

Sec. 315.710 also issued under E.O. 12596, 3 CFR, 1978 Comp. p. 264, also issued under E.O. 13832 and Pub. L. 115-232, Sec. 573.

#### **Subpart F—Career or Career-Conditional Appointment Under Special Authorities**

2. In §315.612, revise paragraphs (a) through (e) and add paragraph (h) to read as follows:

##### **§ 315.612 Noncompetitive appointment of certain military spouses.**

(a) *Agency authority.* In accordance with the provisions of this section, an agency head may appoint noncompetitively a spouse of a member of the armed forces serving on active duty, a spouse of a 100 *percent* disabled service member injured while on active duty, or the un-remarried widow or widower of a service member who was killed while performing active duty.

(b) *Definitions.* For purposes of this section:

(1) *Active duty* means full-time duty in the armed forces, including full-time National Guard duty, except that for Reserve Component members the term “active duty” does not include training duties or attendance at service schools.

(2) *Armed forces* has the meaning given that term in 10 U.S.C. 101.

(3) *Duty station* means the permanent location to which a member of the armed forces is assigned for duty as specified on the individual's permanent change of station (PCS) orders.

(4) *Member of the armed forces or service member* means an individual who:

(i) Is serving on active duty in the armed forces or serving under orders specifying the individual is called or ordered to active duty for more than 180 consecutive days;

(ii) Retired or was released or discharged from active duty in the armed forces and has a disability rating of 100 percent as documented by the Department of Veterans Affairs; or

(iii) Was killed while serving on active duty in the armed forces.

(5) *Spouse* means the husband or wife of a member of the armed forces.

(c) *Eligibility.* (1) A spouse of a member of the armed forces as defined in paragraph

(b)(4)(i) of this section must be currently married to the member of the armed forces on active duty. For appointments made on or after August 13, 2023, the following additional criteria must be met for eligibility for appointment (for appointments made prior to or on August 12, 2023, these criteria do not apply):

(i) The member of the armed forces must have received orders authorizing a permanent change of station.

(ii) The spouse must have married the member of the armed forces on, or prior to, the date of such orders authorizing the permanent change of station.

(iii) The spouse must have relocated or is relocating with the member of the armed forces to the new duty station specified in the documentation ordering the permanent change of station.

(2) A spouse of a member of the armed forces as defined in paragraph (b)(4)(ii) of this section must be currently married to the member of the armed forces.

(3) A spouse of a member of the armed forces as defined in paragraph (b)(4)(iii) of this section must be the un-remarried widow or widower of the member of the armed forces killed on active duty in the armed forces.

(4) Except as indicated in paragraph (c)(5) of this section, noncompetitive appointment of eligible spouses under this section are not restricted to a geographical location.

(5) Effective August 13, 2023, the noncompetitive appointment of a relocating spouse of a member of the armed forces as defined in paragraph (b)(4)(i) of this section is limited to the geographic area of the permanent duty station of the member of the armed forces, unless there is no agency with a position within the geographic area of the permanent duty station of the member of the armed forces.

(d) *Conditions.* (1) In accordance with the provisions of this section, a spouse is eligible for noncompetitive appointment:

(i) From the date of documentation verifying the spouse's marriage to a member of the armed forces as defined in paragraph (b)(4)(i) of this section, where the spouse seeks appointment based upon marriage to an active duty member of the armed forces;

(ii) From the date of documentation verifying that the member of the armed forces is 100 percent disabled, where the spouse seeks appointment based upon marriage to a member defined in paragraph (b)(4)(ii) of this section; or

(iii) From the date of documentation verifying that the member of the armed forces was killed while on active duty where the spouse seeks appointment as the widow or widower of a member defined in paragraph (b)(4)(iii) of this section.

(2) The spouse of a member of the armed forces as defined in (b)(4)(i) of this section may receive unlimited noncompetitive appointments under this section to permanent positions through August 12, 2023. Effective August 13, 2023, the spouse of such a member may receive a noncompetitive appointment under this section if the member receives permanent change of station orders and is limited to one such appointment per permanent change of station.

(3) A spouse of a member of the armed forces as defined in (b)(4)(ii) or (iii) of this section may receive only one noncompetitive appointment under this section to a permanent position.

(4) Any law, Executive order, or regulation that disqualifies an applicant for appointment also disqualifies a spouse for appointment under this section.

(e) *Proof of eligibility.* (1) Prior to appointment, the spouse of a member of the armed forces as defined in paragraph (b)(4)(i) of this section must submit to the employing agency copies of documentation verifying active duty status and documentation verifying marriage to the member of the armed forces (i.e., a marriage certificate or other legal documentation verifying marriage). For appointments made on or after August 13, 2023, the spouse must also submit to the employing agency a copy of the service member's orders reflecting a permanent change of station, dated August 13, 2023 or later. (For appointments made on or before August 12, 2023, this requirement does not apply.)

(2) Prior to appointment, the spouse of a member of the armed forces as defined in paragraph (b)(4)(ii) of this section must submit to the employing agency copies of:

(i) Documentation showing the member of the armed forces retired, or was released or discharged from active duty, with a disability rating of 100 percent; and



(ii) Documentation verifying marriage to the member of the armed forces (i.e., a marriage license or other legal documentation verifying marriage).

(3) Prior to appointment, the spouse of a member of the armed forces as defined in paragraph (b)(4)(iii) of this section must submit to the employing agency copies of:

(i) Documentation showing the member was released or discharged from active duty due to his or her death while on active duty;

(ii) Documentation verifying the member of the armed forces was killed while serving on active duty; and

(iii) Documentation verifying the widow or widower's marriage to the member of the armed forces (i.e., a marriage license or other legal documentation verifying marriage); and

(iv) A statement certifying that the individual seeking to use the authority is the unremarried widow or widower of the service member.

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(h) *Agency Reporting Requirements.* (1) As required by Executive Order 13832, each agency shall report annually (by December 31<sup>st</sup> of each year) to OPM and the Department of Labor on:

(i) The number of positions made available under the military spouse hiring authority;

(ii) The number of applications submitted under the military spouse hiring authority;

(iii) The number of military spouses appointed under the military spouse hiring authority during the preceding fiscal year; and

(iv) Actions taken to advertise the military spouse hiring authority, and any other actions taken to promote the hiring of military spouses.

(2) As required by section 573(d) of Pub. L. 115-232 section 573(d), each agency shall report annually until August 13, 2023, and separate from the report required in paragraph

(h)(1) of this section on the following:

(i) The number of relocating and non-relocating spouses of current military members appointed under this authority;

(ii) The types of positions filled (by title, series, and grade level); and

(iii) The effectiveness of this hiring authority.

(3) Agencies should send their reports electronically to OPM's Employee Services at [militaryspouse@opm.gov](mailto:militaryspouse@opm.gov).

(4) Agencies are also required to send their reports separately and directly to Department of Labor (DOL) at [Merens.Nathan.P@DOL.gov](mailto:Merens.Nathan.P@DOL.gov).

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